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In the

Supreme Court of the United States

8/7/07

SEMPRA GENERATION *et al.*, PETITIONERS,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CA, *et al.*

MORGAN STANLEY CAPITAL GROUP INC., PETITIONER,

v.

PUBLIC UTILITY DIST. NO. 1 OF SNOHOMISH COUNTY WA, *et al.*

CALPINE ENERGY SERVICES, L.P., *et al.*, PETITIONERS,

v.

PUBLIC UTILITY DIST. NO. 1 OF SNOHOMISH COUNTY WA, *et al.*

DYNEGY POWER MARKETING, INC., *et al.*, PETITIONERS,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CA, *et al.*,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE ELECTRIC POWER SUPPLY ASSOCIATION, COLORADO INDEPENDENT ENERGY ASSOCIATION, INDEPENDENT ENERGY PRODUCERS ASSOCIATION, INDEPENDENT POWER PRODUCERS OF NEW YORK, NEW ENGLAND POWER GENERATORS ASSOCIATION, INC., NORTHWEST & INTERMOUNTAIN POWER PRODUCERS COALITION, AND WESTERN POWER TRADING FORUM AS *AMICI CURIAE* IN SUPPORT OF PETITIONS FOR CERTIORARI

NEIL L. LEVY
DAVID G. TEWKSBURY
BETH A. SCHONMULLER
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, D.C. 20005

KENNETH W. STARR
Counsel of Record
KIRKLAND & ELLIS LLP
777 South Figueroa Street
Los Angeles, CA 90017
(213) 680-8400

Attorneys for Electric Power Supply Association

August 6, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Additional counsel:

NICHOLAS MULLER
EXECUTIVE DIRECTOR
COLORADO
INDEPENDENT ENERGY
ASSOCIATION
475 17th Street, Suite 940
Denver, CO 80202
(303) 297-1970

Counsel for
Colorado Independent
Energy Association

JAN SMUTNY-JONES
EXECUTIVE DIRECTOR
INDEPENDENT
ENERGY PRODUCERS
ASSOCIATION
1215 K Street, Suite 900
Sacramento, CA 95814
(916) 448-9499

Counsel for
Independent Energy
Producers Association

GLENN D. HAAKE
GENERAL COUNSEL
INDEPENDENT POWER
PRODUCERS OF NEW
YORK, INC.
19 Dove Street, Suite 302
Albany, NY 12033
(518) 436-3749

Counsel for
Independent Power
Producers of New York

DAVID G. TEWKSBURY
KIRKLAND & ELLIS LLP
655 FIFTEENTH STREET, NW
WASHINGTON, D.C. 20005
(202) 879-5000

Counsel for
Northwest & Intermountain
Power Producers Coalition

DAVID G. TEWKSBURY
KIRKLAND & ELLIS LLP
655 FIFTEENTH STREET, NW
WASHINGTON, D.C. 20005
(202) 879-5000

Counsel for
New England Power
Generators Association, Inc.

DANIEL W. DOUGLASS
DOUGLASS & LIDDELL
21700 Oxnard Street
Suite 1030
Woodland Hill, CA 91367
(818) 961-3001

Counsel for Western
Power Trading Forum

QUESTION PRESENTED

Under the Federal Power Act, as interpreted by this Court in *United Gas Pipe Line Co. v. Mobile Gas Serv. Co.*, 350 U.S. 332 (1956), and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), the Federal Energy Regulatory Commission is prohibited from abrogating the terms of valid wholesale power contracts except in extraordinary circumstances of unequivocal public necessity. In conflict with decisions of this Court and every other Court of Appeals to consider the issue, the Ninth Circuit held that the Commission may nullify a wholesale power contract, even in the absence of public necessity, if the contract rates were not pre-approved by the Commission or if the contract is later deemed to have been formed during a period of market "dysfunction."

The questions presented are:

1. Whether the Ninth Circuit erred in failing to abide by this Court's decisions precluding the Federal Energy Regulatory Commission from retroactively abrogating valid, bilaterally negotiated wholesale energy contracts absent a showing that abrogation is required in the public interest.

2. Whether the Ninth Circuit erred in effectively determining that the *Mobile-Sierra* public-interest standard applies to sellers, but not buyers, that are seeking to escape the terms of freely negotiated wholesale power contracts.

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Cases

Arizona Corp. Comm'n v. FERC,
397 F.3d 952 (D.C. Cir. 2005) 18

Arkansas La. Gas Co. v. Hall,
453 U.S. 571 (1981) 5

Atlantic City Elec. Co. v. FERC,
295 F.3d 1 (D.C. Cir. 2002) 5

Borough of Lansdale v. FPC,
494 F.2d 1104 (D.C. Cir. 1974) 7, 18

Boston Edison Co. v. FERC,
233 F.3d 60 (1st Cir. 2000) 18

Boston Edison Co. v. FERC,
856 F.2d 361 (1st Cir. 1988) 7

D.C. Fed'n of Civic Assoc. v. Volpe,
459 F.2d 1231 (D.C. Cir. 1972) 19

Federal Power Comm'n v. Sierra Pac. Power Co.,
350 U.S. 348 (1956) ..... passim

In re Permian Basin Area Rate Cases,
390 U.S. 747 (1968) 5, 18

Louisiana Pub. Serv. Comm'n v. FCC,
476 U.S. 355 (1986) 19

Metropolitan Edison Co. v. FERC,
595 F.2d 851 (D.C. Cir. 1979) 18

Natural Gas Pipeline Co. of Am. v. Harrington,
246 F.2d 915 (5th Cir. 1957) 7

Northeast Pub. Util. Comm'n v. FERC,
55 F.3d 686 (1st Cir. 1995) 18

Northeast Utils. Serv. Co. v. FERC,
993 F.2d 937 (1st Cir. 1993) 5

Potomac Elec. Power Co. v. FERC,
210 F.3d 403 (D.C. Cir. 2000) 5, 18

Public Serv. Comm'n of N.Y. v. FPC,
543 F.2d 757 (D.C. Cir. 1974) 17

Public Util. Dist. No. 1 of Snohomish County v. FERC,
471 F.3d 1053 (9th Cir. 2006) 3

Public Utils. Comm'n of Cal. v. FERC,
474 F.3d 587 (9th Cir. 2006) 3

Reno v. Bossier Parish Sch. Bd.,
520 U.S. 471 (1997) 14

Rodriguez de Quijas v. Shearson/Am. Express, Inc.,
490 U.S. 477 (1989) 14

Rodriguez v. United States,
480 U.S. 522 (1987) 10

Sam Rayburn Dam Elec. Coop. v. FPC,
515 F.2d 998 (D.C. Cir. 1975) 18

San Diego Gas & Elec. Co. v. FERC,
904 F.2d 727 (D.C. Cir. 1990) 10

Texaco, Inc. v. FERC,
148 F.3d 1091 (D.C. Cir. 1998) 18

Transmission Access Policy Study Group v. FERC,
225 F.3d 667 (D.C. Cir. 2000) 18

United States Gas Pipe Line Co. v. Mobile Gas Serv. Co.,
350 U.S. 332 (1956) ..... passim

Verizon Commc'ns, Inc. v. FCC,
535 U.S. 467 (2002) 5, 10

Wisconsin Pub. Power, Inc. v. FERC,
Nos. 04-1414, *et al.*, 2007 WL 206724
(D.C. Cir. July 20, 2007) 5, 18

Agency Cases

Complaint by The People of The State of Illinois, Ex Rel. Illinois Attorney General Lisa Madigan, Docket No. EL07-47-000 (Mar. 15, 2007) Section 206 Complaint, FERC Docket No. EL07-50-000 (Mar. 26, 2007) Section 206 Complaint, FERC Docket No. EL07-49-000 (Mar. 16, 2007) Section 206 Complaint, FERC Docket No. EL07-40-000 (Mar. 2, 2007) Section 206 Complaint, FERC Docket No. EL07-37-000 (Feb. 22, 2007). 16

Public Utils. Comm'n of Cal. v. Sellers of Long Term Contracts, 103 FERC ¶ 61,354 (2003) 13

Public Utils. Comm'n of Cal. v. Sellers of Long Term Contracts, 99 FERC ¶ 61,087 (2002) 11

San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs., 93 FERC ¶ 61,121 (2000) 13

Standard of Review for Proposed Changes to Market-Based Rate Contracts for Wholesale Sales of Electric Energy by Public Utilities, Proposed Policy Statement, 100 FERC ¶ 61,145 (2002) 12

Other Authorities

502 Foster Elec. Report 10, *S&P Warns That Re-Regulating Utilities Is Like Trying To Put Toothpaste Back In The Tube* (Apr. 11, 2007) 17

Bandt, William D.,
William D. Bandt, et al., *Manifesto on the Cal. Elec. Crisis* (Jan. 30, 2003), *available at http://www.anderson.ucla.edu/faculty/dick.rumelt/Docs/Commentary/Manifesto2003.pdf* 9

Brockway, Walter
Comments of Walter Brockway, Conference to Examine the State of Competition in Wholesale Power Markets (May 8, 2007), *available at* http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=11348437:0 9

CERA Advisory Services, *California Power Crisis Aftershock: The Potential Modification of Western Power Contracts* (April 2007), *available at* http://www.cera.com/aspx/cda/client/report/reportpreview.aspx?CID=8730&KID=..... passim

Dep't of Energy, Energy Info. Admin., *The Changing Structure of the Elec. Power Indus. 2000: An Update* (Oct. 2000), *available at* http://www.eia.doe.gov/cneaf/electricity/chg_stru_update/update2000.pdf 15, 17

Feinstein, Dianne,
U.S. Sen. Dianne Feinstein, Press Release, Senator Feinstein Statement on FERC Ruling By U.S. Ninth Circuit Court of Appeals (Dec. 20, 2006), *available at* http://feinstein.senate.gov/06releases/r-ferc-stmnt1220.pdf 19

FERC, Office of Markets
Oversight and Investigations, *2004 State of the Markets Report* (June 2005), *available at* http://www.ferc.gov/EventCalendar/Files/20050615093455-06-15-05-som2004.pdf 12, 16

Harvey, Scott M., et al., LECG LLC,
Analysis of the Impact of Coordinated Elec. Mkts. on Consumer Elec. Charges (Nov. 20, 2006),
available at http://www.pjm.com/documents/downloads/reports/20061121-analysis-coordinated-elec-mkts.pdf ... 16

ISO/RTO Council,
The Value of Independent Regional Grid Operators (Nov. 2005),
available at http://www.caiso.com/14c6/14c6c4291aa40.pdf ... 16

Kelliher, Joseph T.,
Opening Remarks at the Competition in Wholesale Power Markets Conference,
FERC Docket No. AD07-7-000 (Feb. 27, 2007),
available at http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=11269177:0 ... 15

Kelliher, Joseph T.,
Statement of Joseph T. Kelliher,
Open Commission Meeting of the Federal Energy Regulatory Commission (Apr. 19, 2007),
available at http://www.ferc.gov/news/statements-speeches/kelliher/2007/04-19-07-kelliher-M-1.pdf ... 14

Kelliher, Joseph T.,
Testimony of the Hon. Joseph T. Kelliher before the Senate Energy and Natural Resources Committee (May 10, 2007),
available at http://www.ferc.gov/EventCalendar/Files/20070510122541-05-10-07.pdf ... 12

Letter to FERC Chairman Patrick H. Wood III from U.S. Sen. John Kerry, Docket Nos. EL00-95-045, et al. (Apr. 23, 2003),
available at http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10454705:0 ... 19

Letter to FERC Chairman Patrick H. Wood III from U.S. Sens. M. Cantwell, G. Smith, H. Reid, R. Wyden, B. Boxer, and D. Feinstein, Docket Nos. EL02-28-000, et al. (Oct. 29, 2003), *available at* http://elibrary.ferc.gov /idmws/nvcommon/NVViewer.asp ?Doc=9993942:0 19

National Energy Policy Dev. Group, *Nat'l Energy Policy* (May 2001), *available at* http://www.whitehouse.gov /energy/National-Energy-Policy.pdf 13, 15

Rigby, Peter, Statement of Peter Rigby, Standard & Poor's Director, FERC Docket Nos. EL02-60-000, et al. (Mar. 20, 2002), *available at* http://elibrary.ferc.gov/ idmws/common/opennat.asp? fileID=9055632 ..... 9, 11

Spence, David B. & Cross, Frank, *A Public Choice Case for the Administrative State*, 89 Geo. L.J. 97 (2000) 19

Spitzer, Marc, Statement of Comm'r Marc Spitzer (June 21, 2007), *available at* http://www.ferc.gov/news /statements-speeches/spitzer/ 2007/06-21-07-spitzer-E-3.pdf 12

The Electric Energy Market Competition Task Force, *Report to Congress on Competition in Wholesale and Retail Markets for Electric Energy* (April 2007), *available at* http://www.ferc.gov/ legal/maj-ord-reg/ fed-sta/ ene-pol-act/epact-final-rpt.pdf 9, 11, 16

Wells, Jim,
Statement of Jim Wells, *Meeting Energy Demand in the 21st Century*, GAO-05-414T (Mar. 16, 2005), *available at* http://www.gao.gov/new.items/d05414t.pdf 17

INTEREST OF *AMICI CURIAE*[1]

Amici and their members represent a diverse array of participants in the Nation's electric and natural gas industries, and are directly affected by the issues raised in these cases. *Amici* and their members have made long-term financial commitments, involving hundreds of billions of dollars, in reliance on this Court's settled authorities protecting the integrity of privately negotiated wholesale power contracts. Because the Ninth Circuit decisions purport to grant the Federal Energy Regulatory Commission never-before-recognized authority to abrogate such contracts, *amici* are concerned that the decisions below will destabilize the Nation's power markets, discourage much-needed investment, and ultimately lead to higher costs for consumers.

The Electric Power Supply Association **("EPSA").** EPSA is a national trade association representing competitive electric power suppliers, including independent power producers, merchant generators, and power marketers. EPSA's mission is to promote legislative and regulatory policies encouraging a competitive market for electricity.

Colorado Independent Energy Association **("CIEA").** CIEA is a trade association of competitive

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[1] Petitioners and respondents have consented to the filing of this brief in letters on file in the Clerk's office. Pursuant to S. Ct. R. 37.6, *amici* state that no counsel for a party authored any part of this brief. No person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The attorneys preparing this brief direct the Court's attention to the fact that a second brief as *amicus curiae* will be filed in these same cases on behalf of the Natural Gas Supply Association by different attorneys from the same law firm. Although the attorneys working on the two briefs have shared work product and engaged in joint efforts, the resulting briefs are independent statements reflecting the independent views of the respective clients on whose behalf each of the two individual briefs are being filed.

independent power producers, who are an integral part of Colorado's energy industry, producing electricity with clean, efficient natural gas-fired cogeneration and renewable technologies.

Independent Energy Producers Association **("IEP").** IEP is a California non-profit mutual benefit corporation whose members collectively own and operate approximately one-third of California's installed generating capacity. IEP seeks to reduce dependence on imported energy sources, and to encourage supply options that benefit society economically, socially, and environmentally.

Independent Power Producers of New York **("IPPNY").** IPPNY is a New York State not-for-profit trade association of independent power producers that is committed, among other things, to ensuring that contractual and regulatory agreements and commitments are fully honored.

New England Power Generators Association, Inc. **("NEPGA").** NEPGA is the largest trade association representing electric generating companies in New England. Its mission is to promote sound energy policies that further economic development, jobs, and balanced environmental policy.

Northwest & Intermountain Power Producers Coalition **("NIPPC").** NIPPC represents developers, owners, and operators of non-utility power plants in the Northwest and Intermountain region. The electricity generated at these plants is delivered under long-term contracts to utilities or sold in the spot market.

Western Power Trading Forum **("WPTF").** WPTF is a California non-profit, mutual benefit corporation whose members actively participate in California's restructured electricity markets and are dedicated to enhancing competition. WPTF's broad-based membership includes energy service providers, scheduling coordinators, generators, energy consultants, and public utilities.

INTRODUCTION

For more than fifty years, the Federal Power Act has protected the integrity of contracts. Buyers and sellers of wholesale power have negotiated long-term, fixed-rate contracts with the guarantee that the Federal Energy Regulatory Commission, the Federal Power Commission's successor, has no authority to abrogate those contracts except in extraordinary circumstances "when necessary in the public interest." *United States Gas Pipe Line Co. v. Mobile Gas Serv. Co.*, 350 U.S. 332, 344 (1956).

The decisions below upend the balance struck by Congress and long recognized by this Court and various Courts of Appeals. In an abrupt, unwarranted break from precedent, the Ninth Circuit reinterpreted the Federal Power Act, granting the Commission new authority to abrogate valid contracts if the Commission has not pre-approved the contract rates or if the contracts are later deemed to have been formed during a period of market "dysfunction." *Public Util. Dist. No. 1 of Snohomish County v. FERC*, 471 F.3d 1053, 1061, 1086 (9th Cir. 2006); *Public Utils. Comm'n of Cal. v. FERC*, 474 F.3d 587, 594-96 (9th Cir. 2006). Even more troubling, the Ninth Circuit fundamentally altered the even-handed public-interest standard applied in earlier cases, effectively holding that henceforth only buyers, but not sellers, are entitled to protection from Commission-imposed contract abrogation.

Amici file this brief to emphasize the practical importance of the questions presented. Most importantly, it is essential that the Court appreciate the grave, potentially disastrous effects the Ninth Circuit decisions are likely to have on consumers and the Nation's energy markets. If permitted to stand, the decisions below threaten to destabilize the regulatory framework on which thousands of wholesale power contracts are premised and to impose billions of dollars of unnecessary costs on consumers.

REASONS FOR GRANTING THE WRIT

This Court should grant *certiorari* because the decisions below contravene its own prior decisions and conflict with the decisions of every other Court of Appeals to have considered the issue. (*See* Section A, below.) If they are left uncorrected, the Ninth Circuit decisions threaten to unsettle contract stability, to inhibit much-needed investment in energy infrastructure, and to undermine the Commission's efforts to promote competition and maintain a workable, market-based rate system. Most troubling of all, they may well set the stage for future crises in the Nation's bulk power markets. (*See* Section B, below.) Finally, in greatly expanding and simultaneously blurring the circumstances in which the Commission may abrogate private contracts, the Ninth Circuit decisions have removed an important constraint on arbitrary agency decision-making. (*See* Section C, below.)

A. The Decisions Below Conflict With This Court's Controlling Authorities And Upend More Than Fifty Years Of Settled Precedent.

Over a half-century ago, this Court held in two unanimous decisions that the Federal Power Act preserves the integrity of private contracts. *See Mobile*, 350 U.S. at 347; *Federal Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956). These decisions, referred to collectively as *Mobile-Sierra*, have since become towering landmarks in the regulatory jurisprudence governing domestic energy markets. The decisions recognize that because the Federal Power Act creates a regulatory system based on privately negotiated agreements, the Commission's authority to interfere with private contracts is limited. When sophisticated parties negotiate a wholesale energy contract, the agreed-on rates are presumptively "just and reasonable" and the contract may not be abrogated except in "extraordinary circumstances" of "unequivocal public

necessity." *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968); *see also Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 582 (1981).

The continuing vitality of *Mobile-Sierra* has been confirmed by this Court and assumed by lower courts in a long line of cases. *See, e.g., Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 479 (2002); *Wisconsin Pub. Power, Inc. v. FERC*, Nos. 04-1414, *et al.*, 2007 WL 206724 (D.C. Cir. July 20, 2007); *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002); *Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937, 960 (1st Cir. 1993). These cases have reaffirmed that, absent duress or bad faith at the time the contracts are negotiated, parties must "live with their bargains as time passes and various projections about the future are proved correct or incorrect." *Potomac Elec. Power Co. v. FERC*, 210 F.3d 403, 410 (D.C. Cir. 2000).

Faithfully applying this well-established understanding of *Mobile-Sierra*, the Commission rejected an attempt by California and other buyers of wholesale electricity to escape contracts they had negotiated at arm's-length. The Commission found that, although "other alternatives were available," the buyers freely chose "to enter into the contracts" and knowingly accepted the market risks. Sempra Pet. App. 96a. And the Commission determined that the buyers' "dissatisfaction" with their "bargains" could not justify abrogating the contracts under the public-interest standard. *Id.* (no factor "on this record demonstrates that the contracts are contrary to the public interest").

The Commission's application of the public-interest standard was in no wise unreasonable. California and the other buyers enjoyed significant bargaining advantages and freely chose to enter the long-term contracts, which at the time they trumpeted as "fair, negotiated, hard-fought deals." Sempra Pet. 9. Although the buyers knew the Commission was taking steps to address the market's structural problems, they chose to execute the agreements, because the negotiated contract

rates were well below the then-existing prices for energy on the spot market. Because the buyers had significant bargaining power, some suppliers even agreed to sell power initially "at a substantial loss in hopes of recovering those losses over the life of the contracts." Sempra Pet. 8. Perhaps most significantly, the Commission determined that, although the buyers loudly complained when spot prices later dropped, they could not "demonstrate that the contracts were priced above long-run competitive prices" or otherwise show that the contract rates exceeded just and reasonable levels. *Id.* at 10.

Reversing the Commission, the Ninth Circuit brushed aside the agency's expert determinations and recast *Mobile-Sierra* as a narrow "mode of review" that applies only in "certain limited circumstances." Sempra Pet. App. 300a-301a. Invading the province of both this Court and the Commission, the Ninth Circuit fashioned a brand new test for determining when *Mobile-Sierra*'s public-interest standard protects the integrity of contracts. *See id.* at 324a-327a. The Ninth Circuit ruled that henceforth, if a party seeks to escape its contractual obligations, *Mobile-Sierra* will not apply *unless* (1) the Commission had an opportunity to pre-approve the contract rates; and (2) the contract negotiations occurred in a market free from "dysfunction" and the influence of other "improper factors." *Id.* at 319a-320a.

Even as it narrowed its field of application, the Ninth Circuit reinvented *Mobile-Sierra*, creating a new asymmetrical standard in favor of buyers who become dissatisfied with their long-term agreements. In the Ninth Circuit's view, the public-interest standard differs depending on whether it is a seller or a buyer that is challenging a contract: When a *seller* negotiates an improvident bargain (a so-called "low rate" case), the Commission may not modify the parties' agreement unless the agreement imposes an "excessive burden" on consumers; in contrast, when a

buyer negotiates an improvident bargain (a so-called "high rate" case), the Commission must abrogate the parties' agreement whenever "consumers' electricity bills have been affected" and the challenged rates fall outside a "zone of reasonableness." Sempra Pet. App. 326a (rates fall outside a "zone of reasonableness" if they exceed marginal costs and are not "part of a general trend toward rates that do reflect cost").

Because the Ninth Circuit's newly-fashioned test contravenes this Court's prior decisions, certiorari is warranted. *See* Sempra Pet. 3; Morgan Stanley Pet. 3; Dynegy Pet. 3-4; Calpine Pet. 2. Certiorari is also warranted because the Ninth Circuit has opened an irreconcilable conflict between its decisions below and decisions from other Courts of Appeals, including those of the First, Fifth, and D.C. Circuits. These other courts have held that Commission approval of contract rates is not a prerequisite to applying *Mobile-Sierra*. *See, e.g.*, *Boston Edison Co. v. FERC*, 856 F.2d 361, 371 (1st Cir. 1988); *Borough of Lansdale v. FPC*, 494 F.2d 1104, 1114 (D.C. Cir. 1974); *Natural Gas Pipeline Co. of Am. v. Harrington*, 246 F.2d 915, 919 (5th Cir. 1957); *see also* Dynegy Pet. 11 (noting that the Commission's orders in *Mobile* and *Sierra* accepted, but did not approve, the contracts at issue). These courts have rejected attempts by parties to escape their contractual obligations on grounds of market dysfunction. *See* Dynegy Pet. 19-23. And they have refused to interpret *Mobile-Sierra* as establishing an asymmetrical standard that disadvantages sellers and focuses on buyers' short-term interests to the exclusion of long-term contractual stability. *See id.* at 23-26; *see also* Sempra Pet. 25-26.

In short, the Ninth Circuit has ignored settled principles of *stare decisis*, transforming the *Mobile-Sierra* public–interest standard beyond all recognition and granting the Commission unprecedented authority to abrogate contracts that might have short-term effects on retail rates. This

Court should grant review to correct the Ninth Circuit's improper exercise of judicial policymaking.

B. The Decisions Below Threaten The Public's Long-Term Interests In Reliable And Affordable Energy.

Apart from correcting the Ninth Circuit's improper departure from precedent, this Court's review is needed to prevent lasting damage to the Nation's wholesale energy markets. By making buyer's (but not seller's) remorse a basis for escaping long-term contracts, the Ninth Circuit's newly-fashioned, asymmetrical rules will discourage much-needed investment and undermine the Commission's market-based system, ultimately setting the stage for higher energy costs and less reliable energy supplies.

1. The Ninth Circuit Decisions Threaten To Destabilize Contracts And Inject Uncertainty Into The Nation's Wholesale Energy Markets.

Power markets are highly volatile and hard to predict. As commentators have noted, because power markets are susceptible to periods of inelastic demand and supply, the industry often faces large, sudden shifts in price. *See* CERA Advisory Services, *California Power Crisis Aftershock: The Potential Modification of Western Power Contracts* at 5 (April 2007) ("*Aftershock*"). These price dynamics mean that cash flows from spot markets are cyclical, unpredictable, and often insufficient to cover the full costs of power plant investments. At the same time, the capital requirements of the electric generation sector are enormous. In the next 15 years, the power sector must grow by an estimated 35 percent to keep pace with projected demand. *See id.* at 14. This expansion will require at least "$400 billion in investment in new and existing power plants." *Id.* at 15-16.

In this market environment, fixed-price, long-term contracts are an essential tool for encouraging

investment in infrastructure. In particular, given the large upfront costs and long payout periods characteristic of power plant investments, long-term contracts are an important mechanism through which buyers and sellers manage risk. Long-term contracts "smooth out future cash flows for investors, reducing the cost of investments by reducing the price risk exposure and in doing so, creating savings for buyers too." *Aftershock*, at 6; *see also* Statement of Peter Rigby, Standard & Poor's Director, at 7-8, FERC Docket Nos. EL02-60-000, et al. (Mar. 20, 2002) ("Rigby Statement") (stable contracts "introduce a greater degree of stability and predictability to cash flows"). As a representative of one of the Nation's largest consumers of electric power recently explained, long-term contracts provide security to both buyers and sellers: the "seller gets the security of a long-term revenue stream with which to finance the capital costs of base load generation," while the "buyer receives the security of locking in those capital costs for the term of the contract." Comments of Walter Brockway, Conference to Examine the State of Competition in Wholesale Power Markets (May 8, 2007). Sanctity of contract thus "remains vitally important" to attracting the "capital needed to build adequate generating infrastructure." Sempra Pet. App. 242a.

It is hard to overstate the importance of regulatory certainty and contractual integrity to the efficient working of the electric power industry. *See* The Electric Energy Market Competition Task Force, *Report to Congress on Competition in Wholesale and Retail Markets for Electric Energy*, at 74, 76-77 (April 2007) ("*Competition Report*"); *see also* William D. Bandt, et al., *Manifesto on the Cal. Elec. Crisis* (Jan. 30, 2003) (the "key to the success of an electricity market is the ability of consumers and suppliers to enter into bilateral long-term contracts"). As this Court has recognized, energy facilities "may frequently require substantial investments" that would not be made absent "long-term commitments"

that, once entered, cannot be changed except in extraordinary circumstances. *Mobile*, 350 U.S. at 344. The "certainty and stability" that "stems from contract performance and enforcement" is "essential to an orderly bulk power market." *San Diego Gas & Elec. Co. v. FERC*, 904 F.2d 727, 730 (D.C. Cir. 1990). If the Commission may abrogate contracts whenever short term retail rates may be affected, "business would be transacted without legally enforceable assurances and ... the market, the industry[,] and ultimately the consumer will suffer." *Id.*

The Ninth Circuit did not address these important features of the industry. It instead took a simplistic view that subordinates "the stability of contract considerations that underlie the *Mobile-Sierra* doctrine" to advantaging buyers and insulating consumers from what the lower court described as "unjustifiably high rates." Sempra Pet. App. 325a-326a. The Ninth Circuit decisions, which are driven by an overweening concern for rates paid by consumers in the shorter term, cannot be reconciled with Congress's considered judgment that, over the longer term, consumers are better off, enjoying lower costs and more reliable energy, when the Commission respects the integrity of private contracts. *See Verizon*, 535 U.S. at 479; *see also Rodriguez v. United States*, 480 U.S. 522, 525 (1987) ("it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law").

Today, more than ever, long-term contracts are vital to promoting capital investment in the energy industry, which depends on billions of dollars to maintain and expand the infrastructure essential to providing consumers with clean, reliable, and inexpensive energy. As the Commission has noted, the "[p]reservation of contracts has, if anything, become even more critical since the [*Mobile-Sierra*] policy was first adopted." *Public Utils. Comm'n of*

Cal. v. Sellers of Long Term Contracts, 99 FERC ¶ 61,087 at 61,383 (2002). Under the traditional, cost-based regulatory system, "utility investment decisions were based in part on the promise of a regulated revenue stream with little associated risk to the utility." *Report to Congress*, at 78. Although "money from capital markets was generally available when utilities needed to fund new infrastructure," *id.*, ratepayers shouldered most of the risks of over- or under-building. The same cannot be said of today's competitive regulatory regime where markets are efficient and highly competitive. In this competitive regime, "[p]otential entrants to generation markets must be able to convince capital markets that generation is a viable profitable undertaking" and, hence, the "availability of long-term contracts ... is critical to the ability of non-utility generators to secure capital for new investment." *Id.* at 4. As highlighted by recent bankruptcies of several large merchant power developers, by write-downs of over $30 billion in generating assets, and by lender takeovers of numerous power plants, "building merchant power plants—constructed without contracts for power output or fuel inputs—has proven to be very risky." *Aftershock*, at 16. Projects without long-term contracts have rarely obtained investment-grade ratings. *See, e.g.*, Rigby Statement, at 6-7.

If the decisions below are left uncorrected, investors will need to discount the value of long-term contracts to account for the heightened, unquantifiable risk that the Commission may later modify contracts when buyers complain that rates are too high. Sophisticated investors "will not participate in a market in which disgruntled buyers are allowed to break their contracts, at least not without charging a significant risk premium—a cost that will ultimately be borne by consumers." *Standard of Review for Proposed Changes to Market-Based Rate Contracts for Wholesale Sales of Elec. Energy by Pub. Utils.*, Proposed Policy Statement,

100 FERC ¶ 61,145 at 61,545 (2002) (Brownell and Breathitt, Comm'rs, concurring). As the Commission's Chairman recently testified, if "our energy infrastructure is inadequate, consumers are exposed to higher prices and greater price volatility." Testimony of the Hon. Joseph T. Kelliher before the Senate Energy and Natural Res. Comm., at 2 (May 10, 2007). Notwithstanding the Ninth Circuit's purported concerns for consumer welfare, its decisions threaten to harm consumers by destabilizing competitive markets and adding potentially "billions of dollars per year to the costs of the power business." *Aftershock*, at i.

The Ninth Circuit's short-sighted judicial policymaking also may hinder conservation efforts. Although vital to investment in all types of generation, reliable contracts may well be most essential to ongoing efforts to promote renewable energy sources. Numerous state-approved competitive contract solicitations require utilities to enter long-term contracts obligating them to purchase energy from plants that rely on alternative, renewable energy sources. *See Aftershock*, at 19. Similarly, investment opportunities in conservation and energy-efficient technologies are likely to rely on long-term contracts. *See id; see also* Statement of Comm'r Marc Spitzer (June 21, 2007) ("it is difficult to encourage entities to build much needed infrastructure, including fostering renewable resources, if those parties are unable to enter into enforceable long-term contracts"); FERC, Office of Markets Oversight and Investigations, *2004 State of the Markets Report*, at 232 (June 2005) ("2004 Markets Report") (describing difficulties faced by wind developers in markets where long-term contracts are unavailable). Investors will be loath to risk capital on such projects if the underlying contracts are subject to abrogation by the Commission and market solutions are replaced by court-imposed command-and-control regulation. In fact, under the Ninth Circuit's new asymmetrical

rules, contracts to buy power generated from renewable sources are especially susceptible to abrogation because "technological advances are likely to dramatically reduce" the cost of such power, which could well "push the previous, existing renewable power as well as conservation and efficiency contracts" out of the court-created "zone of reasonableness." *Aftershock*, at 19.

Finally, if the Ninth Circuit decisions are not corrected, its new, asymmetrical rules will likely exacerbate future crises that might occur during periods of volatile energy prices. Sensible regulatory policies encourage market participants to hedge against market fluctuations by negotiating fixed-price, long-term contracts. Such contracts are especially important when spot market prices are volatile and unpredictable. By undermining regulatory certainty and contract stability, however, the Ninth Circuit decisions discourage market participants from negotiating long-term contracts. In fact, by requiring the Commission to invalidate contracts whenever market conditions meet some undefinable standard of "dysfunction," the Ninth Circuit has greatly complicated the negotiation of long-term contracts in precisely those circumstances in which they may be needed most. *See id.* at 20.

The Court should bear in mind that the Commission and others identified an "over reliance" on spot markets as a major cause of the California energy crisis in 2000-2001. *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 93 FERC ¶ 61,121 at 61,359 (2000); *see also* National Energy Policy Dev. Group, *Nat'l Energy Policy*, at 5-12 (May 2001) ("forcing utilities to purchase all their power through volatile spot markets, imposing a single-price auction system, and barring bilateral contracts all contributed to the problems that California now faces"); *Public Utils. Comm'n of Cal. v. Sellers of Long Term Contracts*, 103 FERC ¶ 61,354 at 62,416 (2003) (quoting the Governor of California stating that the contracts challenged in this case "should

stabilize the market and drive the price of electricity down"). As the Commission's Chairman explained, one "of the lessons of the California and Western power crisis was that relying exclusively on short-term markets presents major risks to both utilities and consumers." Statement of Joseph T. Kelliher, Open Commission Meeting of the Federal Energy Regulatory Commission (Apr. 19, 2007). This is only one of the many lessons that the Ninth Circuit decisions disregard.

2. The Ninth Circuit Decisions Threaten To Prevent The Commission From Maintaining A Workable Market-Based Rate System.

Over and above their impact on contract stability, the decisions below threaten to deprive consumers of the long-term benefits of competition that Congress and the Commission have introduced into the Nation's wholesale power markets.

Although the Ninth Circuit asserted that the shift to market-based rates requires rewriting this Court's *Mobile-Sierra* decisions, Congress has taken a different approach. Congress has amended the Federal Power Act on numerous occasions, including revising it in 2005, but has consistently declined to change the public-interest standard or to expand the Commission's authority to abrogate private contracts. *See, e.g., Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 483-84 (1997) (it is significant when Congress has failed to modify a statute in the face of a longstanding judicial interpretation); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 496 (1989) (Stevens, J., dissenting) (it tips the "balance between judicial and legislative authority" to depart from earlier decisions giving "a statutory provision concrete meaning, which Congress elects not to amend during the ensuing 3 1/2 decades"). In fact, Congress has moved steadily in the opposite direction, recognizing that competitive energy markets offer substantial long-term benefits to consumers, including lower retail rates. As the

Commission's Chairman recently observed, the Energy Policy of Act of 2005 represents the "third major federal law enacted in the last 25 years to embrace wholesale competition." Joseph Kelliher, *Opening Remarks at the Competition in Wholesale Power Markets Conference*, FERC Docket No. AD07-7-000 (Feb. 27, 2007). Whether "competition is the correct national policy" is not an open question. *Id.*; *see also National Energy Policy*, at 5-12 (recommending that President Bush encourage the Commission "to use its existing statutory authority to promote competition"); Dep't of Energy, Energy Info. Admin., *The Changing Structure of the Elec. Power Indus. 2000: An Update*, at 63 (Oct. 2000) ("*Changing Structure*") (describing President Clinton's 1998 and 1999 Comprehensive Electricity Competition Plans as "built on the premise that a competitive electric energy market will lower prices, encourage innovation, and allow customers a choice in electric energy suppliers").

Following Congress's lead, the Commission, like other federal and state policymakers, has implemented initiatives designed to correct inefficiencies inherent in the command-and-control model of regulation favored by the Ninth Circuit. These pro-competitive initiatives have yielded significant benefits to consumers. Studies suggest that consumers have saved an estimated $34 billion in electricity costs between 1989 and 1996 as a result of Commission policies favoring market-based rates. *See Aftershock*, at 24. Most importantly, the Commission's balanced, market-based regime has facilitated investment in energy infrastructure and broader participation in energy markets. As of April 1, 2006, the Commission had granted market-based rate authority to approximately 1,170 diverse entities, including 390 independent power marketers, 100 power marketers affiliated with traditional utilities, 180 independent power producers, 400 power producers affiliated with traditional utilities, and 30 financial institutions.

See Competition Report, at 35. The emergence of this new and more flexible power industry, including power marketers and financial institutions, has "improved the industry's ability to address credit issues, increased the ability of companies to buy and sell energy, and increased market liquidity." *2004 Markets Report*, at 64. The Commission's balanced, pro-competitive policies have also facilitated the development of organized, bid-based markets, which have "created significant savings for electricity buyers." ISO/RTO Council, *The Value of Independent Reg'l Grid Operators* at 25 (Nov. 2005); *see also Competition Report*, at 31. A recent study estimates a net savings to consumers of $1.2 million *per day* in portions of the East and Midwest where bid-based markets have been established. *See* Scott M. Harvey, et al., LECG LLC, *Analysis of the Impact of Coordinated Elec. Mkts. on Consumer Elec. Charges*, at 1 (Nov. 20, 2006).

The Ninth Circuit decisions threaten to undo these accomplishments. Its new, asymmetrical rules will make it difficult for the Commission to manage a workable, market-based rate regime. Even if it seeks to cabin the Ninth Circuit decisions as limited to their facts, the Commission cannot unilaterally repair the damage because uncertainty will continue to loom over the industry as reviewing courts wrestle with the inter-circuit split and disappointed litigants maneuver for Ninth Circuit review. In fact, the new authority granted to the Commission by the Ninth Circuit has already spawned challenges to billions of dollars of power contracts. *See, e.g.*, Compl. by The People of The State of Ill., Ex Rel. Ill. Attorney General Lisa Madigan, Docket No. EL07-47-000 (Mar. 15, 2007); Section 206 Compl., FERC Docket No. EL07-50-000 (Mar. 26, 2007); Section 206 Compl., FERC Docket No. EL07-49-000 (Mar. 16, 2007); Section 206 Compl., FERC Docket No. EL07-40-000 (Mar. 2, 2007); Section 206 Compl., FERC Docket No. EL07-37-000 (Feb. 22, 2007).

More significantly, the regulatory uncertainty created by the Ninth Circuit's asymmetrical rules may well drive contracting parties back toward the relative certainty afforded by cost-based rates. *See* Statement of Jim Wells, Director National Resources and Environment, *Meeting Energy Demand in the 21st Century*, GAO-05-414T, at 7-8 (Mar. 16, 2005) ("[e]nergy suppliers require clear signals regarding national policies and confidence that those policies will be sustained over time"). Such a move threatens, among other things, the viability of competitive, bid-based markets, which depend on the certainty provided by a prior grant of general Commission authorization to transact at market-based rates. *See Changing Structure*, at 63. Even if one could ignore the potentially billions of dollars in benefits that would be lost by a retreat from competition, there is no ignoring the substantial costs such a retreat would impose on consumers. *See, e.g., S&P Warns That Re-Regulating Utilities Is Like Trying To Put Toothpaste Back In The Tube*, 502 Foster Elec. Report 10 (Apr. 11, 2007).

C. The Decisions Below Remove An Important Constraint On Arbitrary Agency Action.

By rewriting *Mobile-Sierra*, the Ninth Circuit has not only substituted its views for those of the expert Commission, it also has (somewhat paradoxically) eliminated an important constraint on arbitrary agency decisionmaking. For decades, *Mobile-Sierra* framed the boundaries of permissible Commission action, ensuring that the public interest is adequately protected, while imposing carefully prescribed limits on the Commission's authority to abrogate privately negotiated agreements. *See, e.g., Public Serv. Comm'n of N.Y. v. FPC*, 543 F.2d 757, 797 (D.C. Cir. 1974). Until the decisions below, courts deferred to the Commission's special expertise in deciding when abrogating a contract may be required in the public interest, *see* Sempra Pet. 26-

28, but did not allow the Commission to exceed the scope of its authority.

The system has worked well. When the Commission has determined that contracts contravene the public interest, its decisions have been upheld. *See, e.g., Arizona Corp. Comm'n v. FERC*, 397 F.3d 952 (D.C. Cir. 2005); *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 709-12 (D.C. Cir. 2000); *Texaco, Inc. v. FERC*, 148 F.3d 1091, 1096-97 (D.C. Cir. 1998); *Northeast Pub. Util. Comm'n v. FERC*, 55 F.3d 686 (1st Cir. 1995). Similarly, until now, courts have, *without exception*, affirmed Commission orders withholding relief where it found that contract modification was not in the public interest. *See e.g.*, *Permian*, 390 U.S. at 820-22; *Wisconsin Pub. Power*, slip op. at 57-61; *Potomac Elec. Power Co. v. FERC*, 210 F.3d 403 (D.C. Cir. 2000); *Metropolitan Edison Co. v. FERC*, 595 F.2d 851 (D.C. Cir. 1979). It is indisputable that the Commission retains "plenary authority to limit or to proscribe contractual arrangements that contravene the relevant public interests." *Permian*, 390 U.S. at 784. But there is an important difference between protecting the public and abrogating contracts for the benefit of particular constituents. When the Commission has lost sight of the public interest, courts have not hesitated to "remind" the Commission that "it is not free to ignore" this Court's decisions in *Mobile-Sierra*. *Sam Rayburn Dam Elec. Coop. v. FPC*, 515 F.2d 998, 1005 (D.C. Cir. 1975).

The Commission's reluctance, in the face of the Ninth Circuit decisions, to defend the *Mobile-Sierra* doctrine is therefore not entirely unexpected. The Commission has a longstanding, well-documented record of ambivalence toward *Mobile-Sierra*. *See, e.g., Boston Edison Co. v. FERC*, 233 F.3d 60, 68 (1st Cir. 2000) (the Commission is "becoming hostile to *Mobile-Sierra*"); *Rayburn*, 515 F.2d at 1005 (the Commission's "distaste for the *Mobile-Sierra* doctrine is well known"); *Lansdale*, 494 F.2d at 1110 (the Commission "very much dislikes the *Sierra Mobile*

doctrine"). This ambivalence is presumably the product, at least in part, of the agency's institutional interest in being liberated from the statutory constraints that *Mobile-Sierra* recognizes. *See, e.g.*, David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 Geo. L.J. 97, 113 (2000) ("when an agency must make decisions about the reach of its own jurisdiction, self-interest propels the agency toward ever more expansive interpretations of the law"); *cf. Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374-75 (1986) (an "agency may not ... expand its power in the face of a congressional limitation on its jurisdiction").

Finally, the Court should recognize that the Ninth Circuit decisions remove an important barrier protecting the Commission from improper political pressures. *Cf. D.C. Fed'n of Civic Assoc. v. Volpe*, 459 F.2d 1231, 1245-46 (D.C. Cir. 1972) (agency decisions based on political pressures are invalid). In these proceedings, for example, the Commission has faced an unprecedented degree of purely political pressure to ignore this Court's precedents and interfere with the arm's-length agreements negotiated by the sophisticated contracting parties involved. *See, e.g.*, Ltr. to FERC Chairman Patrick H. Wood III from U.S. Sens. M. Cantwell, G. Smith, H. Reid, R. Wyden, B. Boxer, and D. Feinstein, Docket Nos. EL02-28-000, et al. (Oct. 29, 2003) ("writing in support of requests for rehearing by the complainants"); Ltr. to FERC Chairman Patrick H. Wood III from U.S. Sen. John Kerry, Docket Nos. EL00-95-045, et al. (Apr. 23, 2003) (urging the Commission to "support the State's efforts to renegotiate the long-term energy contracts"); *see also* U.S. Sen. Dianne Feinstein, Press Release, Senator Feinstein Statement on FERC Ruling By U.S. Ninth Circuit Court of Appeals (Dec. 20, 2006). The even-handed, market-based system that has generated significant benefits to consumers will undoubtedly suffer if the Commission is empowered to look beyond the public interest and put a regulatory

thumb on buyers' side of the scale whenever buyers become dissatisfied with the contract rates they have freely negotiated.

* * *

The Federal Power Act establishes a regulatory system founded on private contracts. That system, as recognized in the *Mobile-Sierra* line of cases, operates for the benefit of both the public and the Commission. The Ninth Circuit decisions unwisely depart from binding precedent, create an uneven standard in favor of buyers, and threaten to upend the stability of long-term contracts on which this Nation's energy markets depend. The lower court's disruptive, short-sighted decisions should not be allowed to stand.

CONCLUSION

For the foregoing reasons, the Court should grant the writ of *certiorari*.

Respectfully submitted,

NEIL L. LEVY
DAVID G. TEWKSBURY
BETH A. SCHONMULLER
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000

KENNETH W. STARR
Counsel of Record
KIRKLAND & ELLIS LLP
777 South Figueroa Street
Los Angeles, CA 90017
(213) 680-8400

Attorneys for the Electric Power Supply Association

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